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IN THE

Supreme Court of The United States

OCTOBER TERM, 1970

NO. [redacted] 24

INDIANA REVENUE BOARD, ET AL.,

Petitioners,

v.

STATE OF INDIANA, on the relation of the City of Indianapolis, as successor in interest to the Mass Transportation Authority of Greater Indianapolis, a municipal corporation, and Richard M. Givan and John F. Neff,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF INDIANA

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IN THE

Supreme Court of The United States

OCTOBER TERM, 1970

NO. 1680

INDIANA REVENUE BOARD,

EDGAR D. WHITCOMB, as Governor of the State of Indiana and as a Member of the Indiana Revenue Board,

JOHN K. SNYDER, Treasurer of the State of Indiana, and as a Member of the Indiana Revenue Board,

TRUDY SLABY ETHERTON, Auditor of the State of Indiana, and as a Member of the Indiana Revenue Board,

INDIANA DEPARTMENT OF STATE REVENUE,

JAMES O. MATHIS, as Commissioner of the Indiana Department of State Revenue,

THE STATE BOARD OF TAX COMMISSIONERS,

JOSEPH D. GIESLIN, JR., CARLETON L. PHILLIPPI, and DURWOOD STRANG, as Members of the State Board of Tax Commissioners of Indiana,

RICHARD D. GREEN, as Inheritance Tax Administrator,

Petitioners,

v.

STATE OF INDIANA, on the relation of the City of Indianapolis, as successor in interest to the Mass Transportation Authority of Greater Indianapolis, a municipal corporation, and RICHARD M. GIVAN and JOHN F. NEFF,

Respondents.

OPINIONS BELOW

The Petition for Certiorari is directed to an order of the Indiana Supreme Court entered on February 3, 1970, refusing to accept transfer of an order of the Appellate Court of Indiana, entered on December 16, 1969. The Respondent, State of Indiana on the Relation of the Mass Transportation Authority of Greater Indianapolis, a municipal corporation, filed a Verified Petition for Order for Payment of Funds Pursuant to Judgment setting out that the Petitioners had been mandated to act in accordance with a judgment of the Appellate Court of Indiana entered on December 31, 1968, and affirmed by the Indiana Supreme Court on February 6, 1969, but that Petitioners had failed to comply with the Court's mandate. A petition for Rehearing filed by the Petitioners was denied by the Indiana Supreme Court on March 13, 1970.

JURISDICTION

The Petitioner is invoking the jurisdiction of this Court under 28 U.S.C. Sec. 1257(3). As set forth in Rule 19 of the Supreme Court of the United States, "A review on Writ of Certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefore."

The decision of the Appellate Court of Indiana was based upon non-Federal ground which was adequate to support th Court's judgment.

The Petitioners have waived any claim under the Equal Protection Clause of the Fourteenth Amendment, since it was not seasonably raised.

QUESTIONS PRESENTED

1. Whether the Order and Opinion of the Indiana Ap-

pellate Court dated December 16, 1969, was appealable and is subject to a writ of certiorari?

2. Whether any of the Federal questions presented by the Petitioners were preserved by them by having been seasonably raised?

3. Even if the Federal question of equal protection was raised at an early enough time to preserve it for certiorari, were the Petitioners the proper parties to raise it, and in the alternative, hasn't the question of equal protection been raised prematurely?

4. Were the Federal questions concerning due process of law substantial so as to enable this Court to issue a Writ of Certiorari, and were these Federal questions at all or were they instead properly decided State questions?

5. Whether John F. Neff and Richard M. Given are proper respondents in this action?

STATUTES AND RULES INVOLVED

In addition to the Statutes set forth by the Petitioners, the Respondents submit at Appendix B, pages A-2 to A-12, the following statutes and rules:

Statutes providing for removal of cases to the Indiana Appellate Court, Acts of 1965 (2nd Spec. Sess.) Ch. 7, Burns' Ind. Statute Vol. 2., Pt. 2 (1968 Repl.) § 3-2121-3-2128.

Statute creating the department of Transportation of the Consolidated City of Greater Indianapolis, successor to the Mass Transportation Authority. Acts of 1969, ch. 173, § 314, Burns' Indiana Statute Ann. (1969 Supp.). § 48-9213.

Statute regarding a two-two division on the Indiana Supreme Court, in effect until January 1, 1970, then Re-

placed by an identical rule. Acts of 1881 (Spec. Sess.), Ch. 38, § 654, Burns' Indiana Statute Ann. (1968 Repl.) § 2-3232.

Appellate Rule 15 (e) of the Indiana Rules of Civil Procedure.

Statute regarding waiver of service of process for successor party.

Act of 1881 (Spec. Sess.) Ch. 38, § 56, Burns' Indiana Statute Ann. (1967 Repl.), Sec. 2-803.

STATEMENT OF THE CASE

I.

Proceedings Prior to and Including Judgment

On the last day of the 1967 session of the Indiana General Assembly, House Enrolled Act No. 1818, which alters the formula for distribution of inheritance taxes collected by each county, having been duly passed by both houses, was presented to and accepted by the Governor for final action by him. The Governor did not veto the bill by any of the methods prescribed by the Indiana Constitution. He in fact took no action on the bill, attempting to exercise what was known as a "pocket veto." The bill contained an emergency clause which caused it to become effective immediately upon passage. In Indiana a bill presented to the Governor becomes law after five days, if he fails to sign it or veto it.

Later, when the Auditor and the Treasurer of Indiana failed to pay to the Mass Transportation Authority of Greater Indianapolis (the recipient of Marion County's new share of inheritance taxes under House Enrolled Act 1818), the Mass Transportation Authority employed Richard M. Givan and John F. Neff to file an action to

mandate the various state officials to comply with the ministerial acts dictated by House Enrolled Act No. 1818. The action was filed in July, 1967. The Indiana Attorney General, pursuant to Acts of 1965 (2nd Spec. Sess.), Ch. 7, Burns' Indiana Statute Ann. (1968 Repl.) § 3-2121 thru 3-2129, requested the Indiana Appellate Court to remove the suit to that Court for original action there. The Appellate Court agreed to remove the case and accept jurisdiction and thus became the trial court.

The matter was put at issue by cross motions for judgment on the pleadings and cross motions for summary judgment.

On December 31, 1968, the written opinion of the majority of the Appellate Court was certified to the Clerk of the Court holding so-called pocket vetoes invalid and rendering a judgment for the Mass Transportation Authority in its request for a mandate.

II.
Post Judgment Proceedings

On January 10, 1969, the Petitioners filed a Petition to Transfer to the Indiana Supreme Court and also a Petition for Rehearing with the Appellate Court. In neither of these petitions were any Federal questions raised. They then requested instruction from the Indiana Supreme Court as to the proper method of appealing under the "Removal" Statute, since the Appellate Court had acted as trial court. The Indiana Supreme court advised them that, as had been previously held, a Petition for Rehearing was unnecessary as a prerequisite for filing a Petition to Transfer and that this latter petition was proper. On February 6, 1969, the Judgment of the Ap-

pellate Court was affirmed when the Indiana Supreme Court split-two members voting to refuse transfer, two voting to accept transfer and one member abstaining. The abstaining member was Richard M. Givan, one of the original attorneys of record, newly elected to the State's highest court.

On the very same day, February 6, 1969, the House of Representatives of the Indiana General Assembly, which was then in session, voted to suspend rules and passed House Enrolled Act 1455, now Acts of 1969, Chapter 20, a retroactive repealer of House Enrolled Act No. 1818. The bill was passed by the Senate on the following day, and signed by the Governor on February 12, 1969. That act, too, contained an emergency clause. On February 28, 1969, the Respondent filed its Petition for Order for Payment of Funds Pursuant to Judgment, and John F. Neff filed a Notice of Attorney's Lien which was, in accordance with the terms of the written contract which he and Richard M. Givan had entered into with the Mass Transportation Authority.

Defendants filed their Motion to Dismiss Respondent's Verified Petition for Order for Payment of Funds on April 11, 1969, and Respondents filed Answer to said Motion to Dismiss on April 24, 1969.

On October 21, 1969, the Court overruled the Motion to Dismiss, granted Plaintiff's Verified Petition for Order for Payment of Funds and ordered the Treasurer of the State to certify the amounts due Respondent to the Auditor of the State of Indiana and ordered the Auditor to draw her warrant. In this Order, the Court on its own Motion substituted all of the Petitioners except John K. Snyder, Treasurer, as parties, in lieu of their predecessors in office. The Auditor of the State, Trudy Slaby Eth-

erton, had been in office since December 1, 1968, the other taking office on or after January 1, 1969.

An amended Order was issued on November 6, 1969, rescinding the order of October 21, 1969. The Amended Order corrected wording which confused the method of computing the amount due the Mass Transportation Authority. This order was pursuant to Respondent's petition.

The Petitioners again filed a Petition to Transfer the order of November 6, 1969, to the Indiana Supreme Court, said transfer being denied when Judge Givan abstained and two voted for transfer and two against transfer.

Although the Petitioners, pursuant to their own request eight (8) months earlier had been instructed that the proper method of proceeding was by Petition to Transfer, they, nevertheless, on November 15, 1969, filed a Motion for New Trial relating back to the Judgment rendered on December 31, 1968. It was in this motion that the Petitioners first raised a question of substitution of the Parties. The Appellate Court dismissed this Motion and had it expunged from the record, since it not only was too late but was completely improper procedurally.

The State Treasurer and Auditor responded to the court's order that they were unable to compute the amount of Inheritance Taxes paid to the State by Marion County for the calendar years 1967 and 1968. The court then issued its order of November 19, 1969, ordering each defendant to make the computation or show by affidavit that they could not. The Inheritance Tax Administrator, Richard Green, and Joseph Geeslin and Durwood Strang, Members of the State Board of Tax Commissioners, defendants in this case, did make computations and submitted identical amounts. The Appellate Court then issued a new order on December 16, 1969, requiring the

Auditor to issue her warrant on or before December 22, 1969, and ordering the Treasurer to honor said warrant. The Appellate Court also issued a lengthy written opinion found in Petitioner's Appendices, Appendix A.

The Auditor refused to comply with the Appellate Court Order and on December 23, 1969, the Respondent initiated contempt of court proceedings against her.

On February 26, 1970, the Auditor was found in contempt of court and committed to the Marion County Jail where she remained for five (5) minutes. Finally on March 4, 1970, the Auditor issued her unconditional warrant to the Clerk of the Supreme and Appellate Court in the amount ordered, $12,737,338.97, and thus purged herself of contempt. This amount was disbursed in accordance with the order of the Appellate Court dated December 16, 1969. (Petitioner's Appendix A)

Meanwhile, on January 5, 1970, the Petitioners had again filed a Petition To Transfer from the Appellate Court's Order of December 16, 1969. This Petition was denied on February 3, 1970, and Petitioners' Petition for Rehearing filed February 24, 1970, was likewise denied on March 13, 1970. In both cases the vote was the same, two to two, Judge Givan abstaining.

On January 1, 1970, a statute known as "The Consolidated First Class Cities and Counties Act" went into effect. Under the terms of that act the Department of Transportation of the Consolidated City of Greater Indianapolis became the successor in interest to the M.T.A. and, therefore, became the Plaintiff in this action, and the M.T.A. ceased to exist.

The Petition for Writ of Certiorari by the Petitioners then is taken solely upon the Appellate Court's order and Opinion dated December 16, 1969.

ARGUMENT

I.

REASONS FOR DENYING THE WRIT

The Case Presents No Novel or Far-Reaching Questions

There is nothing unique or unusual about the law in this case. The opinions of the Courts below cite much authority for the position which they took on each point in question.

The main thing that is unusual is the fact that the Petitioners filed five separate petitions to transfer (only two of which were from appealable orders), a motion for new trial from the Appellate Court (after having been advised upon their Petition for Instructions by the Indiana Supreme Court to proceed differently), and a Petition for a Writ of Certiorari setting out questions which had never been previously raised in State Court and including two Respondents who, though available, had never been made parties at the State Court level.

The chief question which runs through the entire fabric of the post judgment activity is a non-federal one. That is, whether either by administrative refusal or by legislative act a valid, binding, final judgment of a court, say the highest court in a state, can be ignored or invalidated successfully.

The case law of the State of Indiana says that this cannot be done. *Columbus, C & I C.R.W. Co. v. Board of Com'rs. of Grant County, et al.* (1879), 65 Ind. 427, 438:

Searcy v. The Patriot and Barkworks Turnpike Co., et al., (1881) 79 Ind. 274, 279; *Citizens State Bank of Carmel v. Perisko* (1921), 77 Ind. App. 70, 130 N.E. 857.

In the case of *Thorpe v. King* (1967) 248 Ind. 283, 227 N.E. 2nd. 169, this was held to apply not only to legislative attempts to extinguish judgments which created private rights but also public ones.

The Indiana Supreme Court's reasoning was based upon the fact that neither the Executive nor the Legislative Branch of government can so encroach upon the Judicial branch and remain within the bounds of Article 3, § 1 of the Constitution of the State of Indiana establishing separation of powers.

That is the law in the State of Indiana and in numerous other of the fifty states.

Also running through the fabric of this case is whether forgotten or omitted defenses can be raised by filing new appeals from orders which are not appealable, and when they are denied, invoke the jurisdiction of the United States Supreme Court.

The Petitioners would have this court attempt to establish as a uniform rule for all fifty states that a state court judgment establishing a public right may be extinguished by a retroactive repealer. This is purely a state question, and historically the United States Supreme Court will not impose its will in such matters. *Henry v. State of Mississippi, Miss.* (1965), 379 U.S. 443, 85 S. Ct. 564, 13 L.Ed. 2d 408, Rehearing Denied, 380 U.S. 926, 85 S. Ct. 878, 13 L. Ed. 2d 813, Remand Denied, 381 U.S. 908, 85 S. Ct. 1528, 14 L. Ed. 2nd 431.

The Indiana Appellate and Supreme Courts were dealing with the highest officers in the Executive Branch of the

State's government. In reading the thorough opinions it is obvious that these Courts considered this case with great care and restraint, and certainly with an eye toward avoiding anything but strict construction of their own powers under both the Indiana and the U.S. Constitutions.

In any case this is a state and not a Federal question.

II.

The Order of The Indiana Appellate Court Dated December 16, 1969, Is Not an Appealable Order.

The Order of December 16, 1969, from which this appeal is taken is in no way a final judgment. It is of a supplementary nature, ordering the Petitioners to comply with the final judgment entered on December 31, 1968. What the Appellate Court was saying by its order was this—"Despite the Legislature's attempt to repeal House Enrolled Act No. 1818 retroactively, they could not repeal it beyond the date of the judgment, and our judgment is still binding upon you, and you are to comply with it. We have thus far excused your non-compliance, but now are ordering you to comply with our mandate by December 22, 1969."

To be appealable as a final judgment an order or judgment must be one which finally determines the rights of the parties in the suit, or in some distinct and definite branch of it, and which leaves no further question or direction for future determination by the Court. *Blakeman v. Quinn et al.*, (1950), 121 Ind. App. 72, 95 N.E. 2d 638; *Greathouse v. McKinley* (1942), 220 Ind. 462, 44 N.E. 2d 344, 345.

This order did not fully determine the rights of the parties (they had already been determined) and it did

leave future questions and further determinations by the court, e.g. contempt proceedings if the mandated parties failed to comply by December 22, 1969.

That the Petitioners recognize this rule is indicated by their statement on page 24 of their Petition. "That the trial Court's mandate is its judgment in a mandate case is recognized by the Indiana Supreme Court in *Shrader Road Supervisor v. State ex rel Mason*, 157 Ind. 341, 61 N.E. 721 (1901). . . ."

The proper time to appeal the question of the existence of the judgment in view of the retroactive repealer would be when one of the parties was found guilty of contempt.

III.

None of the Federal Questions Presented by The Petitioners Were Properly or Seasonably Raised for The Purpose of a Writ of Certiorari.

The United States Supreme Court is without power to decide whether Constitutional rights have been violated when the Federal questions are not seasonably raised in accordance with the State law. *Edelman v. People of State of California*, Cal. 1953, 344 U.S. 357, 73 S. Ct. 293, 295, 97 L. Ed. 387.

Questions first presented to the highest state court on a petition for rehearing come too late for consideration by the United States Supreme Court on certiorari unless the State court exerts its jurisdiction in such a way that the case could have been brought here had the question been raised prior to the original disposition. *Radio Station WOW v. Johnson*, Neb. 1945, 326 U.S. 120, 65 S. Ct. 1475, 1480, 89 L. Ed. 2092.

The attempt to assign new errors in the petition for rehearing, which was overruled without an opinion passing on Federal Questions cannot avail. *Walters Pierce Oil Co. v. Texas*, Tex. 1909, 212 U.S. 112, 29 S. Ct. 227, 53 L. Ed. 431.

When these three rules are applied to this Petition for Writ of Certiorari, it is found totally lacking. Petitioners set out on page 10 of their petition that:

> "The equal protection question was first presented to the Supreme Court on February 24, 1970, in '*Petition for Rehearing*'." (Our Emphasis)

Later on the same page:

> "Lack of due process in the entire proceedings under the Fourteenth Amendment to the United States Constitution was first raised on *Petition for Rehearing*, with Brief, filed on February 24, 1970, seeking transfer of the Order and Opinion of December 16." (Our Emphasis)

These two questions then were admittedly on the face of the Petition, presented as an attempt to first assign new errors in the petition for rehearing which the cases of *Walters Pierce Oil Co. v. Texas*, Tex. 1909, 212 U.S. 112, 29 S. Ct. 227, 53 L. Ed. 431, and *Radio Station WOW v. Johnson*, Neb. 1945, 326 U.S. 120, 65 S. Ct. 1475, 89 L. Ed. 2092 say cannot be done.

Page 10 of the Petition also indicates that the due process question of notice and hearing was first raised in a Motion for New Trial which was filed on November 14, 1969, and which, because it was absolutely outside Indiana's rules of practice in this instance, was dismissed and stricken from the record, meaning it never was raised at all in accordance with state law. Under the rule set out in

Edelman v. People of State of California, Cal. 1953, 344 U.S. 357, 78 S. Ct. 293, 97 L. Ed. 387 such a question is not seasonably raised.

IV.

The Petitioners Are Not the Proper Parties to Raise the Question of Equal Protection for Residents of the Other Counties in Indiana, and the Question in Any Case is Prematurely Raised.

It should be here noted that all except three or four of the ninety-two counties have similar actions pending for mandate against these same petitioners for their share of inheritance tax money due them under House Enrolled Act No. 1818. None of these actions was commenced prior to October, 1969, however, and in none of these other cases has there been a final determination that any other county is or is not entitled to its share of inheritance tax money.

In addition all of the counties in which the Petitioners reside, as set out on Page 17 of the Petition, have entered into suits against the Petitioners by and through their Board's of County Commissioners. If the Petitioners want to avoid a denial of equal protection, let them merely pay the amount due the other counties and thus equate them with Marion County.

a) The denial of equal protection argument put forth by the Petitioners brings to mind the following analogy: A state finds that it has made an error in computing the tax rate for people in a certain income bracket so that 10,000 people now are entitled to refunds. All are notified, but only a few make the necessary applications for refund. The State Officials refuse to pay the persons who

have properly applied for refunds on the ground that those who have not applied for their refunds will be "denied equal protection of the law."

At present there is no determination as to whether the other counties in Indiana will get their inheritance tax money, so we cannot presume that a denial of equal protection will even take place. In any case the party who acted to protect its rights under the law should not be penalized because of those who may have failed to act.

b) The equal protection argument raised by the Petitioners is not an argument accruing to them, but one which should be made by the other counties.

In order to be granted Certiorai by the United States Supreme Court the Petitioner must show that the enforcement of the judgment would deprive them, not others of a right arising under the Federal Constitution or laws.

Liberty Warehouse Co. v. Burley T. S. Coop. M. Assn., Ky. 1923, 276 U.S. 71, 48 S. Ct. 291, 72 L. Ed. 473; *Smith v. Indiana*, Ind. 1903, 191 U.S. 138, 24 S. Ct. 51, 48 L. Ed. 125; *Marshall v. Dye*, Ind. 1913, 231 U.S 250, 34 S. Ct. 92, 58 L. Ed. 206.

Here if the courts determine that the other counties are not entitled to the same share of Inheritance Tax money as was received by the Mass Transportation Authority of Marion County, it is for those counties to complain about denial of equal protection and not these petitioners.

V.

The Non-Federal Grounds Upon Which This Case is Based are Adequate and the Federal Grounds Upon Which This Petition is Based are not Substantial Enough for the U. S. Supreme Court to Review Them.

a) Petitioners' argument regarding denial of due process revolves mainly around the fact that some of the petitioners were substituted as parties to this cause by the Appellate Court *sua sponte*.

The Indiana Appellate Court discussed this at length in its opinion of December 16, 1969, (see Petitioners' Appendices, page 6-10). The State of Indiana has a statute regarding substitution of parties (see Respondent's Appendices page A-11.) upon which the court based its decision that substitution was proper. In addition the Court held that by appearing generally and pleading to motions, etc., the Petitioners waived necessity for service of process and other notice.

These Petitioners were all state officials and the suit was filed against each individual in his capacity as an officer of the State. The Appellate Court held that such officers upon election enter their office *lis pendens*, and they are bound to know the suits pending against the office. They step into the shoes of the former office holder with all of the notice that he had.

The ruling by the highest court in a State that a substitution of defendants was properly made under state law and practices is conclusive and binding on the Supreme Court of the United States.

Boston v. Jackson, Mass. 1922; 260, U.S. 309, 43 S. Ct. 129, 67 L. Ed. 274.

b.) The Petitioners filed an enormous amount of dilatory-sham pleading, which both the Supreme and Appellate Courts of the State had no choice but to dismiss. Typical of this type of pleading was a "Petition for the Appointment of Special Judges" which the Petitioners filed with the Indiana Supreme Court on December 16, 1969, requesting that the Supreme Court appoint a panel of judges to replace itself to reconsider the Petitioners' Petition for Rehearing filed on December 8, 1969. In dismissing that Petition, the Indiana Supreme Court, Per Curiam, said:

> "To summarize, *this cause* has been fully and finally litigated by virtue of the Appellate Court's decision and our denial of transfer. This Court was extremely reluctant to respond to the instant petition, since it can only be characterized as a dilatory pleading by a party bent on delaying execution of an adverse judgment. To consider the petition in any other light would be to presuppose an immense lack of knowledge on the part of the petitioners relative to the mechanics of Appellate procedure. We are not yet inclined to make that supposition."
>
> *State Ex Rel Mass Transportation Auth. v. Indiana Revenue Board* (1969) —— Ind. ——, 254 N.E. 2d 1, 5.

The dismissed or overruled petitions set out in Question 3 on page 12 of the Petition were all of this nature. In addition the State Auditor made repeated written statements saying that she would not abide by the Court's order.

The Petitioners attempt to make a Federal question out of the fact that the written opinion of the majority was not certified to the Clerk of the Court until one month after the death of one of the judges voting with the majority. Not only is this the first time the objection has been raised, though a year and one half has elapsed since

the judgment was rendered but they don't point out that the minority written opinion was certified down only 3 days before.

Are the Petitioners claiming that Judge Cook did not in fact vote with the majority? There has never been any proof of this offered by the Petitioners, especially since it has never been brought up before.

The Petitioners claim they were unable to obtain judicial review. They have filed five Petitions to Transfer thus far. If they are complaining because they were all denied by a two to two split, this is not true. At least one was denied by a three to none vote. In any case the statute providing for just such a case has long been on the books in Indiana (see Respondent's Appendices, page A-10 & A-11).

VI.

Richard M. Givan and John F. Neff are Not Proper Respondents.

The Petitioners have indicated in their Petition that they also intend to Petition this Court for a Writ of Certiorari on the contempt question. (Petition, page 9) Since Richard M. Givan and John F. Neff were recipients of their fee pursuant to compliance with a rule to show cause, it would seem that, if they should be made respondents anywhere in the proceedings, it should be there.

Here, the question is not the *payment* in compliance with the mandate that is in question, but the decision of the Indiana Courts regarding the repealer, and the subsequent claim of bad treatment of the Petitioners by the Courts. The Respondent's attorneys are in no way involved in that, especially not Judge Givan, who did not participate in the case after February 1, 1968.

CONCLUSION

This Court does not issue a Writ of Certiorari where the non-federal questions have been properly decided by the State Courts and the federal questions, if they exist, have not been seasonably raised.

The Writ should be denied.

Respectfully submitted,

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